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The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

November 21, 2018
SPR18/1644

Ashley K. Carvalho, Esq.
Massachusetts Port Authority
One Harborside Drive, Suite 200S
East Boston, MA 02128

Dear Attorney Carvalho:

I have received the petition of Lucas Larson of *MuckRock News* appealing the response of the Massachusetts Port Authority (Authority) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Mr. Larson requested a copy of an identified "Disaster and Infrastructure Resiliency Plan (DRIP) for Boston Logan Airport." The Authority denied his request claiming the responsive record is exempt from disclosure pursuant to Exemptions (a) and (n) of the Public Records Law. G. L. c. 4, § 7(26)(a), (n).

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also *Dist. Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

Exemption (a)

Exemption (a), known as the statutory exemption, permits the withholding of records that are:
specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. See Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

The Authority indicates that "[p]ursuant to 49 CFR §§ 15 and 1520, critical aviation asset information is Sensitive Security Information ('SSI'), and no part of a record containing SSI may be disclosed to a person without an operational 'need to know.' The DRIP lists and details how vital aviation assets of the Authority could be incapacitated and how their destruction or incapacity would have debilitating impacts on security at the airport." In Mr. Larson's petition for appeal, he indicates that "49 C.F.R. §§ 1520.15(b) and 49 C.F.R. §§ 15.15(b) state that documents containing SSI and non-SSI may be released with the SSI redacted."

Under the Public Records Law states that "the burden shall be upon the custodian to prove *with specificity* the exemption which applies." G. L. c. 66, § 10(b)(iv)(*emphasis added*); see also Globe Newspaper Co. v. Police Comm'r, 419 Mass. 852, 857 (1995); Flatley, 419 Mass. at 511. Despite the Authority's response, it remains unclear how the Authority may utilize 49 C.F.R. 15 and 49 C.F.R. 1520 through Exemption (a) of the Public Records Law; specifically, based on the Authority's response, it is unclear if the claimed regulations apply to the Authority. It is additionally unclear which sections of the cited regulations the Authority is claiming permit withholding of the requested record in its entirety.

As a result, I find the Authority did not meet its burden of explaining with specificity how the report, in its entirety, is exempt from disclosure under Exemption (a).

See Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

Exemption (n)

Exemption (n) permits the withholding of:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. It is the duty of the custodian of records to exercise reasonable judgment to determine whether release of the record is likely to jeopardize public safety. The first prong of Exemption (n) examines “whether, and to what degree, the record sought resembles the records listed as examples in the statute;” specifically, the “inquiry is whether, and to what degree, the record is one a terrorist ‘would find useful to maximize damage.’” People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res., 477 Mass. 280, 289-90 (2017).

The second prong of Exemption (n) examines “the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety.’” *Id.* at 289-90. The PETA decision further provides that “[b]ecause the records custodian must exercise ‘reasonable judgment’ in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.” *Id.*

The Authority indicates that it “is entitled to withhold records relating to the security or safety of persons or buildings, transportation or other infrastructure located within the Commonwealth, the disclosure of which is likely to jeopardize public safety. The Authority has determined that the public release of an assessment on critical assets of the Authority, including information on building uses and construction, is likely to jeopardize public safety.”

Despite the Authority’s response, it is unclear how the responsive report in its entirety pertains to the type of information contemplated in the first prong of the PETA analysis


and whether there are any portions of the report that could be disclosed without likely jeopardizing public safety. Specifically, it is unclear how the entirety of the report reflects policies and procedures. Further, the Authority's response does not explain how the report would be "useful [to terrorists] to maximize damage" as discussed in the PETA case. See PETA, 477 Mass. at 298.

Therefore, I find the Authority has not met its burden to show how the report, in its entirety, may be withheld under Exemption (n). See Reinstein, 378 Mass. at 289-90; G. L. c. 66, § 10(a).

Conclusion

Given that the Authority has not met its burden to explain how an exemption applies to the requested records, the requested records may not be withheld. Accordingly, the Authority is ordered to review the records, redact where necessary, and provide Mr. Larson with responsive records, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us. The Authority may file a request for reconsideration of this determination within ten business days of the date of this determination letter.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Lucas Larson